IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 46/2002
with
CIVIL APPLICATION NO.256/2002 &
MISC. CIVIL APPLICATION NO. 245/2003.

Shri Shailesh Durgananda Sanvordencar
alias Ramnath Durgananda Sinai
Sanvordencar, major, married,
Indian National, businessman, resident of
Sushila Niwas, Durganand Nagar,
Curchorem, Goa. ..... Appellant.

V/s.

1. Shri Durgananda Ramnath Sinai
   Sanvordencar, adopted son of late
   Ramnath V. Sanvordencar, major,
   married, Indian National, resident of
   Sushila Niwas, Durganand Nagar,
   Curchorem, Goa.
2. M/s. Saanil Realtors Private Limited,
   a Company incorporated under the
   Companies Act, having Office at
   Datta Krupa, Durganand Nagar,
   Curchorem, Goa through its
   Managing Director Shri Durganand
   Ramnath Sinai Sanvordencar;
3. Smt. Pallavi Pradeep Sawardekar
   (deleted as per order dated 26.9.02)
4. Smt. Maqueira I. alias M. Mendes,
   major, married, Indian National,
   resident of S-1, 2nd Floor,
   Atreya Apartents, Durganand Nagar,
   Curchorem, Goa.
5. Smt. Asha Sonu Kamat,
   wife of Dr. Sonu V. Kamat,
   major, married, Indian National,
   resident of Dr. Sonu Kamat Maternity
   and Surgical Hospital,
   Curchorem, Goa.

6. Shri Shaikh Inus Kamal,
major, married, Indian National,
resident H.No.3944, Kuncoliekar Chawl,
Davorlim, Navelim, Salcete, Goa.
7. Shri Arvind D. Saglani,
major, married, Indian National,
resident of Vrindavan Apartments,
Bebquegal, Curchorem, Goa; and his wife;
8. Smt. Nita Arvind D. Saglani,
major, married, Indian National,
resident of Vrindavan Apartments.,
Bebquegal, Curchorem, Goa.
9. Smt. Luciana Fernandes, major,
married, Indian National,
behind Perpetual Succor Convent School,
Marutigad, Cacora, Goa.
10. Smt. Gitanjali Gokuldas Tari,
(deleted as pr Order dated 10.10.2002)
11. Shri Joseph F. Barracliffe, major,
married, Indian National,
residing near the Church, Morailem,
Curchorem, Goa.
12. Shri Xavier F. Baracliffe, major,
married, Indian National,
residing near the Church,
Morailem, Curchorem, Goa.
13. Smt. Christalina Carvalho, major,
married, Indian National, Flat No.G-2,
Dattaprasad Apartments,
Curchorem, Goa.
14. Shri Ganpat P. Chari
(deleted as per Order dated 10.10.2002) ..... Respondents.

Mr. S. G. Dessai, Senior Advocate with Mr. Shivan Dessai, Advocate for the appellant.

Mr. J.E. Coelho Pereira, Sr. Advocate with Mr. V. Korgaonkar, Advocate for respondents No.1 and 2.

CORAM : **P.V. KAKADE, J.**

DATE : **5TH OCTOBER, 2006**.

ORAL JUDGMENT :

Heard learned Counsel for the both the parties. Perused the record. While admitting the appeal, an ex parte temporary injunction was granted which still continues.

2. The appellant-plaintiff has impugned the order passed by the Civil Judge, Sr. Division, Quepem rejecting the application for temporary injunction and hence, the present appeal.

3. Initially, it must be noted that in order to adjudicate the issue involved in its proper perspective, it would be necessary to advert to the background of the matter, so as to correctly appreciate the situation.

4. The appellant-plaintiff is the son of respondent No.1 who filed suit for cancellation of instrument i.e. the special power of attorney and the general power of attorney executed by the mother of the plaintiff in favour of defendant No.1, who is his father. The plaintiff has sought declaration regarding the said documents, seeking that those should be

declared null and void and, consequently, all the transactions carried out by the defendant No.1 on the strength of the said special power of attorney as well as the general power of attorney should be declared void in law, on the ground that his mother is not in proper state of mind to understand the execution of power of attorneys due to her ill-health and the said power of attorneys executed by the defendant No.1 without disclosing the contents thereof and consequences upon the same. The defendant No.1 has challenged the contentions raised by the plaintiff on various grounds stating that the mental condition of his wife is normal and she has executed the impugned documents of her free volition.

At the time of filing of the suit, the plaintiff sought temporary injunction against the defendants which was granted ex parte, but after hearing both the parties, the said ex parte injunction came to be vacated. Thereupon, Appeal from Order No. 38/2001 came to be filed in this Court against the said rejection. The Court, by Order dated 14.6.2001 disposed of the appeal on the basis of the statement made by the learned Counsel for respondent No.1 to the effect that respondent No.1 had no intention to dispose of the petrol pump or the suit dealership. It was further stated that even so far as as the suit properties were concerned, the respondent No.1 had no intention to dispose of the ancestral properties. However, as it appears from the contents of the order, it was pointed out to the Court that

there were some properties, wherein third party interests were created. Taking into account that aspect, this Court further observed that certain properties at Village Curchorem surveyed under Nos. 101 and 155 were being developed where the agreement had been entered into and in respect of Survey No.89/1 agreement was already entered into with respondent No.14 in respect of the plot at Sanvordem and, therefore, in view of this position, it was noted that the flats were constructed in the property surveyed under Nos. 101 and 155 and, therefore, the rights of the flat purchasers could not be prejudiced, so far as third parties were concerned and those were not developed. In view of this position, it was observed that the respondents to keep account of the properties and the income fetched on account of development. Similarly, the appellant was also to give account of the petrol pump business and the dealership business. In the light of these direction, the appeal was disposed of. It was further noted that the statement made by the respondent No.1 was without prejudice to the rights and contentions of the respondent in order to bring out amicable solution to the dispute between the parties, however, it so appears that there was no amicable solution could be reached and the matter proceeded.

5. Thereafter, the appellant-plaintiff filed an application for temporary injunction under Order 39, Rule 4 of the Code of Civil

Procedure for modification/variance in the order of temporary injunction on the ground that there were subsequent changes which necessitated the said application. The said application, after hearing both the parties, came to be dismissed which order is impugned in this appeal. The lower Court came to the conclusion that the plaintiff filed the application under Order 39, Rule 4 of C.P. Code on the ground that even though the injunction was refused by the lower Court, the same was partially granted by the High Court and the present respondent No.1 was restrained from creating any third party interests regarding rest of the properties. It was further submitted on behalf of the present appellant in the lower Court that inspite of the said order of the High Court, the respondent No.1 in total violation of the said order, executed the sale deed dated 18.12.2001 transferring the plot No.6 from survey No. 101 to a third party and also has created third party interests contrary to the order passed by the High Court. While dealing with this aspect, the lower Court came to the conclusion that second proviso to Order 39, Rule 4 of C.P. Code could not be invoked because there were no changed circumstances which were brought to the notice by the present appellant. The lower Court was further of the view that the High Court while passing the order has not set aside or upset the order of rejection of the temporary injunction and it was only observed by this Court that the contentions raised by both the parties regarding the

state of mind of the mother of the plaintiff was required to be considered only after the medical evidence is recorded to that effect. In other words, it was held that in no way this Court issued any restrainment order against respondent No.1 so as to move the present application on the basis of the alleged change of circumstances.

6. In order to decide this aspect, one must refer to the order passed by this Court while disposing of the appeal (Appeal from Order No.38/2001) by order dated 14.6.2001. From a plain reading of the said order, it is clear that this Court did not **"dismiss"** the said appeal, but only "**disposed of**" the same on the basis of the statement made by the Counsel for the respondent No.1. Obviously, the said statement amounts to self-restrainment and, therefore, this Court was not called upon to adjudicate the issue on merits when the statement was made to the effect that the respondent No.1 had no intention to dispose of the petrol pump or the suit dealership or the suit properties which were ancestral properties, but the only concession appears to be made in respect of those properties in which third party interests were already created on the date of order i.e. 14.6.2001. Therefore, by necessary implication what was not contemplated by the order of this Court was creation of any third party interests in the remaining properties which were not in existence when the order was

passed. Now, para 8 of the application under Order 39, Rule 4 of C.P.Code made by the appellant has given the details as to how the third party interests were created subsequent to the order passed by this Court, which aspect is not controverted by the respondent No.1 so far as this proceeding is concerned, nor the lower Court has taken into consideration that aspect. In other words, the lower Court has disposed of the application by dismissing the same only on the interpretation of the order passed by this Court to the effect that no temporary injunction was granted by this Court and, therefore, there was no change in the circumstance which could be brought under the vice of Rule 4 of Order 39 of C.P. Code.

In my view, the interpretation given to the order of this Court by the lower Court is totally wrong and is based on misconception of the relevant legal aspect. It is needless to mention that once the High Court disposed of the appeal on the basis of the statement made by the Counsel for the respondent No.1 by which certain conditions were got imposed by the respondent No.1 upon himself, then the respondent No.1 had no business to travel beyond the dicta of this Court which was clear enough on the reading of the order of the Court. No doubt, the appellant had independent forum to take action against the respondent No.1, however, the fact remains that when the provision of Rule 4, of Order 39 of C.P.Code is available, then there was no reason for the appellant to seek any other

independent remedy which was available.

7. The perusal of the order of the lower Court also shows that the learned Counsel for the appellant submitted before the lower Court that the observations of this Court amounted to grant of injunction in favour of the plaintiff, and, therefore, the order passed by the lower Court had merged in the order passed by this Court. However, this submission was rejected on the ground that there was no injunction granted by this Court. In this regard, one must note that though this Court has not granted injunction in the earlier matter in clear terms, however, the perusal of the entire order dated 14.6.01 makes it clear that the appeal was not required to be disposed of on merits by either allowing it or by dismissing it in view of the statement made on behalf of the respondent No.1 to the effect that the respondent No.1 will not dispose of the petrol pump or the suit dealership or the suit properties which were ancestral properties. Under the circumstances, it must be held that the order of disposal of the appeal came to be passed on the basis of “self restraint” imposed on behalf of the respondent No.1. The learned Counsel for the respondent No.1, at this juncture, submitted that the self restraint order was pertaining to the properties of petrol pump as well as the ancestral properties. However, he also made a statement which was recorded by this Court in the earlier oder

to the effect that the properties at Village Curchorem surveyed under Nos. 101 and 155 were being developed where the agreement had been entered into and in respect of survey No.89/1, an agreement had been entered into with the respondent No.14 in respect of the plot at Village Sanvordem respectively. No doubt such a statement was made, however, this Court thereafter considering the said statement made, observed that the flats were constructed in the property surveyed under Nos. 101 and 155 and, therefore, the rights of the flat purchasers could not be prejudiced and precisely for this reason, the subsequent order came to be passed. Today, the dispute revolves around the issue whether subsequent to this order any third party interests are created or not. In my considered view, by virtue of the said order, further action to create third party interests was clearly barred by this Court and for that purpose the hearing of the suit came to be expedited in the interest of both the parties.

8. Though this Court's order did not in so many words grant the temporary injunction, as we have seen earlier, the order amounted to restrainment of the respondent No.1 and, therefore, the order passed by the lower Court had definitely merged into the order passed by this Court earlier. Hence, the observations made by the trial Court in that regard appear to be erroneous. In other words, the only concession which was

made by this Court was to protect interest of third parties in whose favour rights were already created till the date of the order, but such concession was not contemplated to continue for future creation of third party interests.

10. For the reasons recorded above, I hold that the order passed by the Civil Judge, Sr. Division, Quepem in Special Civil Suit No. 41/2000 appears to be erroneous and, therefore, the same is set aside. The application for temporary injunction is allowed in terms of its prayer clauses and the appeal stands disposed of with no order as to costs. Consequently, Civil Application No.256/2002 and Misc. Civil Application No. 245/2003 also stand disposed of with no order as to costs.

The facts and circumstances involved in the present show that it is an unfortunate dispute between the son and the father, regarding writings and execution of documents by the appellant's-plaintiff's mother. This Court has already directed to expedite the hearing of the matter and the lower Court is expected to follow the said direction in letter and spirit. Copies of this Judgment, duly authenticated, be issued to the parties.

P.V. KAKADE, J.

ssm.